U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue date: 30Jul2002

OALJ Nº: 2001-LHC-2812

OWCP Nº: 14-130931

In the Matter of:

Scott D. Statia,
Claimant,

vs.

Nichols Brothers Boat Builders,
Employer,

and

Majestic Insurance Company,
Carrier,

and

Signal Mutual Indemnity Association,
Carrier.

Appearances:

David Condon, Esq.
For Claimant,

Richard Nielsen, Esq.
For Majestic Insurance Co.,

Craig Connors, Esq.
For Signal Mutual Indemnity Association,

Matt Vadnal, Esq.
For District Director, Office of Workers' Compensation Programs.

Before:

William Dorsey,
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

I. Introduction

Scott Statia ("Claimant") is a 42-year old, long-term employee of Nichols Brothers Boat Builders ("Employer"). He filed this claim for wage and medical benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. ("LHWCA" or "the Act") for injuries he suffered to his lower back and lower extremities in a work-related accident on March 29, 1998. Employer changed insurance carriers while Claimant was receiving treatment for this injury. The main issue is whether Majestic Insurance Co. ("Majestic"), the insurance carrier which initially bore the risk under § 4 of the Act to pay all compensation due, or Signal Mutual Indemnity Association ("Signal"), the carrier which assumed that risk later, is responsible to pay benefits for the March 1998 injury. Claimant suffered no other identifiable trauma to his back from work after the initial injury. There is no other reason to shift liability from Majestic to Signal, so Majestic is liable for this claim.

Evidence and argument were presented in this case in Seattle, Washington on March 5, 2002. Claimant's Exhibits 1-22, Majestic's Exhibits 1-6, and Signal's Exhibits 1-11, 12(1) and 12(2) were received in evidence. The parties filed post-hearing briefs in late April and early May, 2002.

After the hearing had taken place, the insurance carriers negotiated a confidential interim funding agreement which authorized Claimant to pursue medical treatment through his choice of physicians, so Claimant would receive disability benefits pending my decision identifing the last responsible insurer. I assume Claimant has had the medically necessary back surgery. No issue about the Claimant's average weekly wage or periods of temporary disability are involved in this decision. Until Claimant reaches maximum medical improvement, whether he will suffer any permanent loss of wage earning capacity, and whether Employer is entitled to relief from the Special Fund under § 8(f) of the Act, cannot be determined.

II. Stipulations

The parties have stipulated that:

1. The parties are covered by the provisions of the Act.

2. Claimant injured his lower back and lower extremities following a work-related accident

on March 29, 1998, while working for Employer.

3. Employer changed insurance carriers on February 1, 1999 from Majestic to Signal.

III. Issues for adjudication

Identifying the insurance carrier responsible to pay the medical and wage benefits for Claimant's injury is the central issue. Signal's affirmative defense of laches and its request for attorney's fees and costs are addressed also.

IV. Findings of fact and conclusions of law

Claimant has been Employer's Facility Maintenance Supervisor for about twelve years. Employer constructs work tug boats, excursion boats, dinner vessels and other recreational water vehicles that range in size between 112 and 360 feet. TR at 16. Before the injury, Claimant's job included stacking cribs (large wood blocks weighing between 30 and 150 pounds which support boats before they are launched into the water), launching completed boats, maintaining equipment, and a variety of other physical activities. He also assisted electricians working on boats being constructed when he had time available. TR at 13-15. Before March 29, 1998, he was in good health and had no limitations in his work activities. He had suffered a few minor back sprains in the mid- to late-1980s, but recovered from them. Those back problems had resolved with treatment from a chiropractor or osteopath, and he returned to his normal work activities within days. TR at 16-17.

On March 29, 1998, Claimant and another worker were carrying large oak cribbing blocks while launching a boat. TR at 17. Those cribbing blocks were about six inches thick, 16 inches wide and four feet long, and weighed up to 150 pounds. Claimant used them to jack the boat up to prevent it from sinking into mud. Claimant stumbled in some mud while carrying one of these blocks. Rather than drop the block, he held on to it, and when he fell he injured his lower back, and felt pain in his back and in both legs. TR at 17-19. He did not miss work due to the injury.

An osteopath provided his initial medical treatment, but when it proved unsuccessful, he became a patient of Richard Alsberg, M.D. TR at 18-21. A lumbar MRI taken on May 6, 1998 revealed a herniated L4-5 disc with an extruded and posteriorly migrated disc fragment. SX 1-a at 28. Dr. Alsberg recommended surgery, but the surgeon, Paul Schwaegler, M.D., recommended additional conservative treatment in the form of a series of lumbar epidural steroid injections. CX 10 at 28. Solomon Kamson, M.D., gave Claimant a series of three of these injections throughout July 1998. CX 11. They initially reduced pain, without altogether eliminating it. SX 9 (Kamson depo.) at 300. Their effect began to wear off after six months. TR at 22.

Claimant's duties changed from hands-on work to more desk-type supervisory work beginning in

August 1998. Claimant no longer cribbed boats or performed heavy lifting after Dr. Alsberg limited him to "light duty."[1] TR at 20. I accept the testimony of Michael Carotty, the Safety, Environmental and Human Resource Director for Employer, that "[Claimant] definitely can't do the type of work that he was doing prior to [March 29, 1998], the heavier work." TR at 83. Claimant still performed electrical work, in which he climbed ladders and crawled in small spaces, but infrequently. When he has done occasional scuba diving for Nichols Brothers since his March 1998 injury, others carried his tanks and weights, and handed them to him after he was buoyant in the water. He has suffered no additional injuries. TR at 24-25.

At just about the time the effects of the steroid injections began to wear off, Nichols Brothers changed insurance carriers from Majestic to Signal on February 1, 1999. Claimant was temporarily laid off a few months later, on July 6, 1999, due to the cyclical nature of Employer's boat building work. He returned to work on August 23, 1999 without another layoff since then.

A few months after the effect of the steroid injections began to wear off, Claimant returned to treatment with Dr. Kamson on July 7, 1999,[2] who recorded that Claimant felt "miserable" then from lower back pain. CX 13 at 35. In that same report, Dr. Kamson recommended a provocative discogram. CX 13 at 36; SX 9 (Kamson depo.) at 300. Majestic would not authorize that test; instead it sent Claimant for an independent medical evaluation from Eugene Wong, M.D. and David Nank, M.D., whose report is dated November 10, 1999. These examiners agreed that Claimant's condition was "the result of the industrial injury on March 29, 1998" and that his symptoms were part of the "natural course of such large disc herniations." SX 3 at 76. Majestic still did not authorize the discogram, however.

A second set of steroid injections in early 2000 did not provide pain relief, so Dr. Kamson referred Claimant to a neurosurgeon, Kim Wright, M.D., who examined him on June 6, 2000. After reviewing a July 11, 2000, MRI report, on August 1, 2000, Dr. Wright also recommended that Claimant have a discogram. SX 4 at 85-86. Jong Soo Park, M.D., an orthopedic surgeon, concurred in Dr. Wright's diagnosis and recommended the discogram. CX 17 at 51-52.

Dr. Kamson was able to perform the discogram on November 16, 2000, about 16 months after he first recommended it. Its results confirmed a collagenized disc fragment at L4-5. SX 2a at 64. Dr. Kamson concluded that a lumbar fusion, rather than a less invasive spinal surgery, was needed to treat Claimant's back condition. SX 9 (Kamson depo.) at 302-303. Dr. Wright concurred with this opinion on January 11, 2001. SX 4 at 89. Claimant was willing to have that surgery in hope that it would alleviate his pain.

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[1]This merely refers to decreased physical exertion rather than to the specific definition of "light" work used by the Secretary of Labor in the Dictionary of Occupational Titles.

[2]By that time, Dr. Alsberg had retired and Dr. Kamson became Claimant's primary treating physician.

I infer from lay and medical evidence that there was no aggravation of Claimant's back condition after the insurer changed on February 1, 1999. Claimant's lay testimony is quite important because he has no reason to care about the outcome here. He will receive identical wage and medical benefits from either carrier. Claimant reported no new injuries after his March 1998 injury, and testified credibly that had he suffered any change in symptoms due to something at work, he would have reported it. TR at 64-65. Claimant himself did not believe that any aspect of the work he did after March 29, 1998 aggravated his back condition in any way. TR at 69. The back pain he experienced doing electrical wiring work was no different than the pain he suffered doing activities of daily living, such as getting dressed, getting in and out of bed and the car, and walking to the grocery store. TR at 67. He had pain shortly after the injury, the first lumbar epidural steroid injections alleviated it temporarily, but that pain returned as the effect of the steroids wore off. Had Claimant testified that the pain which caused him to return to Dr. Kamson was a different type of pain, or more intense pain than he had before the injections, I might have come to a different decision. This would be especially true if some new or more intense pain followed closely in time an identifiable action at work, such as bending in small spaces when wiring a boat. I believe the pain which returned a number of months after the first steroid injections has its genesis in the initial injury in March 1998.

Majestic makes much of Dr. Wright's testimony that he would expect the steroid injections to give Claimant pain relief for two months, and if he did well after that, the absence of pain suggested actual improvement in his condition. SX 10 (Wright depo.) at 363. From this premise, Majestic argues that the return of pain after more than two months implies a new work injury, or at least an exacerbation of Claimant's condition. This is too facile. Majestic ignores Dr. Wright's introductory statement on the topic of pain relief that "Everybody is so different" SX 10 at 363 (internal pg. 42, ln. 3). The treating doctor, Dr. Kamson, also finds the anti-inflammatory effect of steroid injections is variable and unpredictable, but as it wanes, the patient has both pain and neurological deficits. SX 9 (Kamson depo.) at 299. He does not regard recurrence of Claimant's pain by January 1999 as unusual. *Id*. at 306. This case does not turn on so slender a reed as the average time a lumbar epidural steroid injection provides pain relief. I deal not with abstract averages, but with Mr. Statia. He believes the first steroid injections afforded him several months of relief. Dr. Kamson's testimony supports this, and Dr. Wright's testimony does not exclude this possibility. I accept Claimant's testimony on the point.

Should Claimant's lay testimony alone be insufficient, the medical opinion evidence also persuades me that Claimant did not aggravate or worsen his injury after March 1998 by working. Clinical examinations, radiology and other laboratory studies by treating or examining doctors failed to identify an aggravation of Claimant's March 1998 condition, traceable to work he did after Employer changed insurance carriers. Dr. Wright did not believe that Claimant sustained any type of injury after March 1998 or aggravated his back condition by performing light duty beyond his "desk job work." SX 10 (Dr. Wright deposition) at 358, 366. He accepted Claimant's subjective belief that there had been no new incident, new injury, or aggravation of his back condition. *Id*. at

366[3]. Dr. Kamson did not see "any evidence of exacerbation, or aggravation by any intervening events" after the initial injury. SX 9 (Kamson depo.) at 312. *See also*, *id*. at 303, where he specifically rejects the idea of an "intervening injurious process." Neither doctor identified any specific event or incident which actually worsened Claimant's back condition after February 1, 1999, when Employer switched insurance carriers. The last injurious stimuli testifying physicians identified took place in March 1998, while Employer was insured by Majestic. Both Drs. Wong and Nank concluded that Claimant's condition was "the result of the industrial injury on March 29, 1998" and that his symptoms derived from the "natural course of such large disc herniations." SX 3 at 76. They identified no other cause.

Discussion

1. Signal's laches argument

Signal contends it cannot be liable for this claim because Majestic delayed authorizing medically necessary treatment for Claimant (the discogram and surgery), and provided untimely notice to Signal that it believed Signal was liable for them, which resulted in actual prejudice to Signal. I reject this argument.

The affirmative defense of laches bars litigation of an equitable claim when a plaintiff fails to file it in a prompt manner, if that delay actually prejudices the defending party. *See generally Costello v. United States*, 365 U.S. 265, 281 (1961). It is equity's means to supply what a statute of limitations provides in actions at law. This is not an equity proceeding. Neither the Longshore Act nor the Administrative Procedure Act (5 U.S.C. § 501, et seq.) are sources of equity jurisdiction.

Moreover, the Benefits Review Board ("Board") has held on a number of occasions that the defense of laches does not apply to longshore cases because the Act contains specific statutory periods for noticing and filing claims, in Sections 12 and 13. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (4th Cir. 1991); *Hargrove v. Stachen Shipping Company*, 32 BRBS 11 (1998); *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25, 28 (1989);

[3] All of Dr. Wright's testimony was not consistent. During his deposition he also indicated that Claimant's condition could more likely be the result of continuing to work, than from the natural progression of the first injury, SX 10 at 360 (internal page 31). Weighing this single comment against his testimony as a whole, the testimony of Dr. Kamson and that of Claimant, on balance I still am persuaded there was no new injury or aggravation of Claimant's back condition at work after February 1999.

Lewis v. Norfolk Shipbuilding and Dry Dock Corp., 20 BRBS 126, 130 (1987).[4] When a statutory remedy is given, equity does not create a different one.

Even if the laches defense were available to Signal, it failed to show that Majestic unreasonably or inexcusably delayed giving Signal notice of its potential liability, or to show that it suffered identifiable prejudice from Majestic's actions so severe that Majestic's claim should not be permitted to proceed. *Simpson*, 22 BRBS at 28. Signal first contends that Majestic unreasonably delayed and denied necessary medical treatment to Claimant, which resulted in "preventable" further degeneration of Claimant's injured disc. Post-Hearing Brief of Signal Mutual at 18; SX 9 (Kamson depo.) at 37. Secondly, Signal asserts that Majestic's untimely assertion of this claim against Signal prevented Signal from conducting a contemporaneous factual or medical investigation.

Any delay prejudiced Claimant, not Signal. No medical evidence shows that with prompter treatment of another type Claimant could have avoided surgery. Signal failed to show that its potential liability was increased because it did not conduct an earlier medical examination. The party asserting a laches defense must affirmatively demonstrate the actual prejudice it suffered in order to prevail. Delaying an investigation is not *per se* prejudice. Majestic proved no specific prejudice, such as a quantifyable increase in medical costs due to Majestic's delay in authorizing the discogram or the back fusion.

2. Last responsible insurer

Both insurers agree that Claimant suffered a compensable injury requiring back surgery. After trial they arranged to pay for Claimant's surgery. This ought to have been done much earlier. Section 14 (a) of the Act directs that compensation shall be paid "promptly" to an injured employee without an award. The purpose of the Act is to assure prompt aid to the employee when his need is greatest. *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 455-56 (1946); 67 S.Ct. 847; 91 L.Ed. 1011. This is no less true for medical benefits due under § 7 of the Act than it is for wage replacement benefits payable under §14. Neither insurer had a reasonable basis to contest the medical evidence that back surgery was medically necessary treatment for Claimant's work-related injury. It is plainly contrary to the Act to withhold authorization for medically necessary care while insures wrangle over "last responsible insurer" issues. It would be reprehensible for the first insurer to delay surgery, in that hope that while it withheld authorization, Claimant might do something at work which could provide a colorable basis for shifting liability to a later insurer.

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[4]Signal itself cites *Newport News* for this proposition but distinguishes it by arguing that Majestic, not Claimant, failed to exercise diligence in adding Signal as a party. This is said to create a "gap" in the Act when litigation involves successive insurers. The Act says what it says, and it is not my place to address this "gap" by adding a one year period for insurers to join other insurers which the Act does not contain.

The rule on the last responsible insurer is derived from the similar rule for determining the last responsible employer.[5] That rule is: "as between two insurers disputing which must pay claims under the LHWCA, the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by an occupational disease arising naturally out of his employment and exposure is responsible for discharging the duties and obligations of the liable employer." *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 756 (1st Cir. 1992); see also *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001); *Perry v. Jacksonville Shipyards, Inc.*, 18 BRBS 219, 220-21 (1986).

Both parties rely on the decision in *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999), to support their positions. There the Board stated:

> In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Id.* at 35.

Each must show by a preponderance of evidence that Claimant sustained an injury while the other insurer was the one on the risk. All parties accept that Claimant was injured initially while Majestic was the insurer, so Signal's burden is satisfied.

Signal also analogizes to *Kuhnhausen v. Marine Terminals Corp.*, BRB Nos. 99-0782 and 99-0782A (April 20, 2000) to argue that liability attaches to the last carrier which insured the Employer when Claimant suffered his most recent injury. Majestic correctly notes in a May 7, 2002 letter that the *Kuhnhausen* decision has been reversed and remanded by the Ninth Circuit Court of Appeals. *See Kuhnhausen*, 2001 WL 1104625, 19 Fed. Appx. 545 (9th Cir., Sept. 19, 2001). Reading the Ninth Circuit's decision carefully shows the matter was remanded not because BRB's legal reasoning was flawed, but because the ALJ's findings about the claimant's injuries were unclear.

Majestic has not proven by a preponderance of the evidence that Claimant required back surgery due to a new injury or an aggravation of his condition which occurred while Signal was on the risk, as Majestic must under *Buchanan*. No doctor identified any new stimulus, nor did

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[5]"It would seem far more in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability." *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 145 (2nd Cir. 1955).

Claimant. Majestic contends that the issue is not whether there was a precipitant cause, but rather whether the "conditions of a claimant's employment caused him to become symptomatic, even if no permanent harm results." *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233 (3rd Cir. 2002). Majestic's position appears to be that Majestic is absolved from liability if Claimant suffered even a slight aggravation of his symptoms (*viz.*, had any pain) from work he did after February 1, 1999 – when insurance coverage changed from Majestic to Signal. I do not read the case so broadly. The worker in *Delaware River* had both chronic sprain and degenerative changes of the lumbar spine, which caused him so much pain that he lost work for several periods of time, two of which were extensive. Before the second substantial period of disability, the worker had done an unusual amount of overtime work, which exacerbated his back condition. A physician characterized that overtime work as "extremely heavy long-time work, what I call overwork, and that in itself I believe can explain why he had this onset of pain after he was already working." *Id.* at 238. There was no such event here, nor any time lost from work after the insurers changed. Claimant had no different type or intensity of pain. Once the first set of steroid injections wore off, he had the same bothersome pain which had required him to do less physically demanding work as of August 1998, before Signal became the insurer. No large new injurious stimulus or traumatic event must follow the initial injury to relieve the first insurer from liability, but there must be a demonstrable aggravation of the worker's condition. Continued pain of the same type is not an aggravation.

The decision in *Admiralty Coating Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000) adds force to the contention that there was no aggravation here. Kickback while using a high pressure sandblasting hose for employer number 1 caused that claimant to partially tear the rotator cuff tendon in his right shoulder. The worker avoided the heavier sandblasting work thereafter due to lack of strength in his shoulder. Using his shoulder in lighter work spray painting for employer number 2 caused him light, infrequent pain, which did not require him to take any medication. Then he strained his injured shoulder lifting a can of paint at employer number 2, which was diagnosed as an "exacerbation of right shoulder symptoms with mild bursitis and strain component." Like Claimant here, he was given an injection to relieve his pain, which helped a great deal, but failed to alleviate all pain. *Id*. at 515. Fired from job number 2 for an altercation with another employee, he was hired by employer number 3, and lost that job, but not before his doctor recommended right shoulder surgery to repair the torn tendon. He worked for employer number 4, but quit that work in anticipation of the shoulder surgery. When he filed a claim for the shoulder injury, insurers began finger-pointing about which should pay for his surgery, and an administrative law judge found employer number 1 liable. Medical evidence in that case from at least one doctor showed that the worker's final condition after doing both the sandblasting and the painting jobs was due to the natural progression of his initial injury in the sandblasting work. *Id*. at 518. Because the worker had not healed from his shoulder injury at employer number 1, the doctor characterized the shoulder condition after the spray painting job as "an onset of complications from the *first* trauma." *Id.* (emphasis by the Court). The tendon was torn while working for employer 1, and never repaired by surgery. Employer number 1 was not exonerated, and employer number 2 made liable for the entire injury just because the worker experienced pain after lifting a paint can with the unhealed shoulder.

Claimant's pain had been masked temporarily (but incompletely) by the first set of steroid injections. He experienced no aggravation or "second trauma." Majestic is the last responsible insurer, required to pay medical and wage benefits arising from the injury.

3. Attorney's fees and costs

Signal has moved for an award of costs and attorney's fees it incurred, under Section 26 of the Act. Signal asserted at trial and in its Post-Hearing Brief that Majestic should be liable for these costs and fees because it acted purposefully in delaying treatment to Claimant and providing untimely notice to Signal. Essentially, Signal is asking me to assess costs and fees for a bad faith claim denial by Majestic. I decline the invitation for several reasons.

Section 26 of the Act states:

> If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

The statutory text deals only with costs; it says nothing about a recovery of attorney's fees paid out due to another party's bad faith actions with respect to a claim. Signal lacks a statutory basis for its attorney's fees request.

As to the costs of proceedings, I am bound by the decision in *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993). The Ninth Circuit held that the district director, the Board, and administrative law judges all lack the authority to impose costs under Section 26. Costs can only be awarded by an Article III court, for it is "the court having jurisdiction" which "determines" that issue. Signal raised the issue at trial and in its brief, so it preserved the issue, should this matter reach an Article III court. *See Pinell v. Patterson Serv.*, 22 BRBS 61, 66 (1989).

Signal expects me to find the facts necessary to establish its contention that Majestic denied this claim in a bad faith attempt to shift liability to Signal. It would be presumptuous to "determine" a subject which is not my prerogative to decide, and which Congress textually committed to the Article III courts. I make no determination on the merits of Signal's Section 26 claim.

V. Order

It is hereby **ORDERED** that:

1. Majestic remains liable for all reasonable and necessary medical expenses incurred as a result of Claimant's injury, including Claimant's back surgery.

2. Majestic shall pay Claimant temporary total disability benefits while recovering from back surgery. I believe these benefits have been voluntarily paid under the insurers' interim funding agreement.

3. Any petition of attorney's fees and costs must be prepared on a line item basis and comply with 20 C.F.R. § 702.132 in order to be considered. It must be filed within twenty days after service of this Order by the District Director. If a fee petition is filed by Claimant, any objection(s) by Majestic shall be stated on a line item basis, including the reason for the objection and an explanation. Objections shall be filed within ten days after the fee petition is deemed received by Majestic, based on the rules for service of documents by U.S. mail. Items which are not the subject of an objection in the manner required will treated as admitted, and will be allowed. The parties shall then meet and confer within ten days, in an effort to eliminate objections. Within ten days after that meeting, for objections not resolved, Counsel for Claimant may file a line item response to any remaining objections within ten days after their meeting. The response shall state the date the meeting took place.

4. All computation of benefits and other calculations which must be made to carry out this order are subject to verification and adjustment by the District Director.

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William Dorsey,
Administrative Law Judge